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TAN KANG HO v. MAO SHENG MARKETING (M) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[ORIGINATING SUMMONS NO: 24NCC-21-01-2013]
B 17 FEBRUARY 2015

CIVIL PROCEDURE: *Committal proceedings – Application for – Failure to comply with consent order – Whether non-compliance warranted committal proceedings – Whether consent order vague – Whether consent order had to be served personally – Whether mandatory for consent order to be endorsed with penal notice – Whether applicant for committal proceedings failed to comply with procedural safeguards to protect alleged contemnor – Whether non-compliance could be cured – Whether applicant had other avenues other than committal proceedings*

CIVIL PROCEDURE: *Res judicata – Committal proceedings – Setting aside leave for order of committal – Whether applicants' complaints already addressed by suit which had been disposed of earlier – Whether there was an abuse of process of court*

The plaintiff ('applicant') filed a suit on 16 January 2013 (the 'present suit') against the first and second defendant companies and also the third to fifth individual defendants. On 13 March 2013, all the parties in the present suit entered into a consent order (the 'consent order'). Pursuant to the consent order, the applicant engaged Messrs Crowe Horwarh ('Messrs CH') to inspect the first defendant's accounts. On 9 July 2013, Messrs CH prepared an investigative audit report ('CH's report'). After CH's Report had been obtained by the applicant, the applicant filed a winding-up petition against the first defendant. CH's report was adduced by the applicant in support of the applicant's winding up petition. On 29 January 2014, the court dismissed the applicant's winding up petition with costs. The applicant had appealed to the Court of Appeal against the dismissal of the winding up petition. In the meantime, the applicant appointed Messrs Alan Yoon Associates ('Messrs AYA') to complete any outstanding matters in CH's report and also appointed Messrs Dennis Nik & Wong ('Messrs DNW') to replace its previous solicitors. Messrs DNW, on the applicant's instruction, sent a letter dated 4 June 2014 ('DNW's letter') to the solicitors for all the defendants, Messrs Kanesalingam & Co ('Messrs KC') requesting, among others, copies of documents from Messrs CH's list of unattained documents as per their report and a copy of the first defendant's bank statements. Messrs KC replied to DNW's letter by a letter dated 13 June 2014 ('KC's letter') which stated, amongst others, that pursuant to the consent order the first defendant's accounts were already made available to Messrs CH, to which a report had already been prepared and tendered during the applicant's winding up petition. Further, KC's first letter also stressed that the request of employee

register and minutes of board meetings were beyond the terms of the consent order. In addition, the cash sales invoices and bank statements requested by the applicant was also not included as accounts. In response to KC's letter, Messrs DNW replied by way of a letter dated 18 June 2014 ('DNW's subsequent letter') and contended that the word 'account' did include the cash sales invoices and the bank statement as being part of the accounting records of the first defendant and asserted that the applicant's request for the inspection of the documents was in accordance with the said consent order. As such, the applicant filed an *ex parte* notice of application *vide* encl. 26 pursuant to O. 52 r. 3(1) and (2) of the Rules of Court 2012 ('RC') for leave to apply for a committal order against the third to fifth defendants ('leave application'). The leave application was supported by a statement as required by O. 52 r. 3(2) of the RC which set out the grounds on which the committal of the third to fifth defendants were sought. The grounds as stated in the statement *inter alia* were that (i) the defendants' refusal to comply with the consent order was in contempt; and (ii) the word 'account' in the consent order did include cash invoices and bank statements as being part of the accounting records of the first defendant. Pursuant to the leave application, the applicant filed a notice of application *vide* encl. 31 and sought for a committal order against the third to fifth defendants for breach and failure to comply with the consent order. On the contrary, the third to fifth defendants filed an application *vide* encl. 38 to set aside the leave application. To support encl. 38, the third to fifth defendants argued *inter alia* that (i) there was no personal service of the consent order on the third to fifth defendants; (ii) the consent order had no penal notice; (iii) there was no time period specified in the consent order for compliance of the consent order by the third to fifth defendants; and (iv) the applicant was barred by the doctrine of *res judicata* from proceeding with the committal proceedings as the applicant's complaints had already been addressed by the dismissal of the applicant's winding up petition. Further issues that arose for determination *inter alia* were (i) whether a party to a consent order may enforce a consent order by way of contempt of court proceedings when the applicant for committal proceedings did not comply with certain procedural safeguards, which were intended to protect the alleged contemnor; (ii) whether the applicant's non-compliance could be cured under O. 1A, O. 2 r. 1(1), (2) and (3) of the RC; and (iii) whether there was an alternative avenue for applicant other than committal proceedings.

Held (allowing encl. 38; dismissing encl. 31 with costs to be paid by the applicant to the third to fifth defendants):

(1) The applicant was not barred by the *res judicata* doctrine from commencing committal proceedings against the third to fifth defendants based on a breach of the consent order. The dismissal of the applicant's winding-up petition concerned the application of s. 218(1)(f) and (i) of the Companies Act 1965 ('CA'). The main

purpose of a committal proceeding was to prevent an undue interference with the administration of justice. As the purpose and the issues which arose in the applicant's winding-up petition were different from the committal proceedings, the court was not bound by any decision or finding in the applicant's winding-up petition. (para 37)

(2) The consent order only stated that the applicant and his auditors 'are entitled to inspect the accounts' of the first defendant. The consent order did not mention anything about 'accounting records' of the first defendant. Based on the meanings of 'accounting records' and 'accounts' in s. 4(1) of the CA, the consent order did not provide that the applicant and his auditors 'are entitled to inspect' the first defendant's 'accounting records' and the outstanding documents. In fact, 'employee register' and 'minutes of board meetings' of the first defendant fell beyond the definition of the first defendant's 'accounting records' and as such, the applicant's demands for such documents were clearly not warranted by the consent order. (para 41)

(3) For the purpose of committal proceedings, a court order should be interpreted as if it was a penal legislation. If there was any ambiguity in the court order, the ambiguity should be resolved in favour of liberty of the alleged contemnor. Accordingly, if there was any ambiguity in the meaning of the word 'accounts' in the consent order, such an ambiguity must be resolved in favour of the third to fifth defendants. The third to fifth defendants therefore did not breach the consent order when the first defendant did not allow the applicant to have access to the outstanding documents. (para 43)

(4) The omission of a penal notice as required by O. 45 r. 7(4) of the RC in the consent order clearly showed that the consent order did not impose any mandatory obligation on the first defendant, let alone the third to fifth defendants. Further, as the consent order did not specify a time period for the first defendant to give access of the outstanding documents to the applicant, O. 45 r. 5(1)(a) of the RC did not apply to the consent order. (paras 44 & 45)

(5) Once the first defendant's accounts had been made available to Messrs CH so as to enable the CH's Report to be made, the first defendant had already complied with the consent order. Hence, there could be no breach of the consent order by the first and third to fifth defendants. When the first defendant had made available its accounts to Messrs CH and the CH's report had been prepared, there existed a reasonable doubt on whether the first defendant and the third to fifth defendants had wilfully breached the consent order. Such a reasonable doubt in itself justified a dismissal of encl. 31. (paras 46 & 47)

(6) For a breach of a court order or undertaking to court to constitute a contempt of court, there should be a real risk that such a breach would undermine public confidence in the administration of justice. In cases of a breach of an injunction or an undertaking to court, there was definitely a real risk, if not a fact, that public confidence in the administration of justice would be undermined. As the present suit had ended with the recording of the consent order, there could be no tendency by the third to fifth defendants to interfere with proceedings in the present suit. There was also no real risk that a breach of the consent order, if any, would undermine public confidence in the administration of justice. (paras 49 & 50)

(7) As a contumelious act lowered the court's authority and dignity, an applicant for a committal order must act with reasonable promptitude. CH's report had already been prepared on 9 July 2013. By this date, the applicant would have actual knowledge regarding the alleged refusal of the first defendant to allow the applicant's auditors to have access and to make photocopies of the outstanding documents. The leave application was only filed on 6 August 2014. There had been an unexplained delay of nearly 13 months. As such, the applicant had not acted with reasonable promptitude. (paras 53-55)

(8) Order 45 r. 7(6)(a) and (b) of the RC did not apply in this case as there was no evidence that the third to fifth defendants were present when the consent order was made or had been notified of the terms of the consent order. Further, the applicant had not applied under O. 45 r. 7(7) of the RC to dispense with the personal service of the consent order on the third to fifth defendants. Based on the applicant's non-compliance with O. 45 r. 7(2)(a) of the RC, encl. 38 to set aside the leave for committal was allowed. (para 57)

(9) Under O. 45 r. 6(2) and (3)of the RC, the applicant may apply to the court to specify a time period in the consent order for the first defendant 'to do an act'. However, the applicant had not made such an application. If there was no application to specify the time period, the applicant could not apply to endorse the penal notice on the consent order. Even if the applicant had applied to specify a time period in the consent order and to endorse the penal notice on the consent order as against the third to fifth defendants, the endorsed and amended consent order had to be personally served on the third to fifth defendants before the applicant could enforce the endorsed and amended consent order against the third to fifth defendants. (paras 60 & 64)

(10) There was no proof beyond all reasonable doubt that the third to fifth defendants had breached the consent order; there was no tendency by the third to fifth defendants to interfere with the due administration of

justice in the present suit as the present suit had already been concluded with the recording of the consent order. If the court exercised its discretionary power under O. 1A, O. 2 r. 1(1), (2) and (3) of the RC to cure the applicant's non-compliance, it would cause an injustice to the third to fifth defendants. (para 67)

(11) The power to punish for contempt of court should be used sparingly and as a last resort in the interest of administration of justice where all other reasonable avenues have failed. The applicant's true complaint was that the investigative audit could not be completed due to the applicant's lack of access to the outstanding documents. The purpose of the investigative audit was to ascertain whether, among others, the third to fifth defendants had breached their statutory duties owed to the first defendant under s. 132(1), (1A), (1B) and (2) of the CA. As such, the applicant had a right to lodge a complaint with the Companies Commission of Malaysia ('CCM') and the CCM had the investigative powers under CA to investigate the alleged breaches. As the applicant had a reasonable alternative of complaining to the CCM, the applicant should not have resorted to committal proceedings. (paras 71 & 72)

Case(s) referred to:

Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors [1986] 2 CLJ 109; [1986] CLJ (Rep) 58 SC ***(refd)***

Asia Commercial Finance (M) Bhd lwn. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Capital Insurance Bhd v. B S Sidhu [1996] 3 CLJ 477 CA ***(refd)***

Comet Products UK Ltd v. Hawkex Plastics Ltd [1971] 2 QB 67 ***(refd)***

Inter Heritage (M) Sdn Bhd v. ASA Sport Sdn Bhd [2009] 2 CLJ 221 CA ***(refd)***

Loh Eng Leong & Anor v. Lo Mun Sen & Sons Sdn Bhd & Anor [2003] 4 CLJ 743 CA ***(refd)***

Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals [2002] 1 CLJ 695 CA ***(refd)***

Malaysian Bar v. Tan Sri Dato Abdul Hamid Omar [1989] 2 CLJ 373; [1989] 1 CLJ (Rep) 92 SC ***(refd)***

McLeod v. St Aubyn [1899] AC 549 ***(refd)***

Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 FC ***(refd)***

OKRST Arumugam v. KRSSP Suppiah Chettiar [1935] 1 LNS 43 HC ***(refd)***

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

Re B (A Minor) (Contempt of Court: Affidavit Evidence) [1996] 1 WLR 627 ***(refd)***

Solicitor-General v. Radio Avon Ltd [1978] 1 NZLR 225 ***(refd)***

Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***

Taylor & Anor v. Ribby Hall Leisure Ltd & Anor [1997] 4 All ER 760 ***(refd)***

The "Vanda" [1960] 1 LNS 145 HC ***(refd)***

Universal Trustee (Malaysia) Berhad v. Lambang Pertama Sdn Bhd & Anor [2014] 1 LNS 227 HC ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal [1995] 3 MLJ 549 ***(refd)***
Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors & Another Appeal [2010] 2 CLJ 858 CA ***(refd)***
Yong Nyuk Fang & Anor v. Tan Boon Pin & Ors [2006] 7 CLJ 296 HC ***(refd)***
Zainuddin Muhammad v. ATSCO Ltd & Ors [2001] 4 CLJ 141 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 4(1), 7B(1), (2), 7C(1), 7C(3), 7D(1), (2), (3), 132(1), (1A), (1B), (2), 167(6), 218(1)(f), (i),
Criminal Procedure Code, ss. 2(1), 3, 173(f)(i), (ii), 180(1), (2), (3)
Rules of Court 2012, O. 1A, O. 2 r. 1(1), (2), (3), O. 32 r. 6, O. 42 r. 6(1), (2), (3), O. 45 rr. 5(1)(a), 6(1), (2), (3), 7(2)(a), (3), (4), (6)(a), (7), O. 52 rr. 3(1), (2), 6(4)

Civil Procedure Rules [UK], r. 81.4(1)

For the plaintiff - Rajvinder Singh (Kevin Cheong Heng Wai with him); M/s Dennis Nik & Wong
For the 3rd, 4th & 5th defendants - V Jeyakumar (Aston Paiva with him); M/s Kanesalingam & Co

Reported by Sandra Gabriel

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] This case discusses whether a party to a consent order may enforce a consent order by way of contempt of court proceedings when:

(a) there is no tendency to interfere with the due administration of justice or to subvert the course of justice in connection with legal proceedings;

(b) there is no necessity to maintain or vindicate the authority of the court;

(c) the applicant for committal proceedings ('applicant') did not comply with certain "procedural safeguards" which are intended to protect the alleged contemnor; and

(d) there is an alternative avenue for the applicant.

Background

[2] The applicant is an individual who has filed this suit ('this suit') on 16 January 2013 against the following parties:

(a) the first and second defendant companies ('first and second defendants'); and

(b) the third to fifth individual defendants ('third, fourth and fifth defendants').

[3] On 13 March 2013, all the parties in this suit entered into a consent order ('consent order') which reads as follows:

> (i) *The [Applicant] and his duly appointed qualified auditor are entitled to inspect the accounts of the 1st Defendant and to take photocopies for the period from 2004 to 2012 (if available) provided that the auditor furnishes an undertaking on terms as set out in section 167(6) of the Companies Act 1965 [CA] (the Undertaking) [Paragraph (i)].*
>
> (ii) The Undertaking is to be furnished to the Court.
>
> (iii) **The [Applicant] undertakes not to divulge the contents of the 1st Defendant's accounts to any third party. [Paragraph (iii)]**
>
> (iv) Parties are at liberty to apply.
>
> (v) No order as to costs.
>
> (vi) The *ad interim* injunction order dated 6th February 2013 stands discharged.
>
> **[Paragraph (vi)]**
>
> (emphasis added)

[4] In the consent order, there was an endorsement purportedly made under O. 45 r. 7 of the Rules of Court 2012 ('RC') which stated as follows ('purported endorsement'):

> *If you [Applicant] and/or your servants, officers and/or agents and/or the [Applicant's] auditors disobey this order, you will be liable to process of execution for the purpose of compelling you to obey the same.*
>
> (emphasis added)

I use the description purported endorsement because under the purported endorsement, there was no:

(a) name and signature of the High Court's Senior Assistant Registrar; and

(b) seal of the High Court.

[5] Pursuant to the consent order, the applicant has engaged Messrs Crowe Horwarh ('Messrs CH') to inspect the first defendant's accounts for the period from 2004 to 2012. On 9 July 2013, Messrs CH prepared an "Investigative Audit Report" ('CH's report').

[6] After CH's report has been obtained by the applicant, the applicant filed a winding up petition against the first defendant in Kuala Lumpur High Court (Winding Up) Petition No. 28NCC-509-05-2013 ('applicant's winding up petition') to wind up the first defendant under s. 218(1)(f) and (i) CA. CH's report was adduced by the applicant in support of the applicant's winding up petition. On 29 January 2014, Hanipah Farikullah J dismissed the applicant's winding up petition with costs ('dismissal of applicant's winding

up petition'). The applicant has appealed to the Court of Appeal against the dismissal of applicant's winding up petition ('applicant's appeal') and the applicant's appeal is pending.

[7] On 8 May 2014 the applicant appointed Messrs Alan Yoon Associates ('Messrs AYA') to "finish up the outstanding matters" in the CH's report.

[8] In this suit, the applicant was initially represented by Messrs Patrick Dass & Co ('Messrs PD'). On 30 May 2014, the applicant appointed Messrs Dennis Nik & Wong ('Messrs DNW') as his solicitors to replace Messrs PD.

[9] Messrs DNW, on the applicant's instruction, sent a letter dated 4 June 2014 ('DNW's letter dated 4 June 2014') to the solicitors for all the defendants, Messrs Kanesalingam & Co ('Messrs KC') requesting, among others:

> We have been instructed by our client to request for the inspection of the following documents from your clients **within ten (10) days** from the date hereof:
>
> (i) copies of documents from [Messrs CH's] list of unattainable documents as per their report, relevant pages as enclosed herewith; and
>
> (ii) copy of the 1st Defendant's bank statements from 1.1.2008 till 31.12.2012.
>
> In the interim, our client reserves all his rights.

[10] Messrs KC replied to DNW's letter dated 4 June 2014 by way of a letter dated 13 June 2014 ('KC's letter dated 13 June 2014') which stated, among others:

> 3. We are instructed that:
>
> 3.1 *the [Consent Order] only orders for an inspection of the 1st Defendant's accounts with an auditor permitted to take photocopies of the same, and was made in your client's capacity as a director of the 1st Defendant at the material time.*
>
> 3.2 *the 1st Defendant's accounts were already made available to your client's previous auditor, to which they had subsequently prepared a report which had been tendered into [sic] [the Applicant's Winding Up Petition]. Upon provision of the relevant accounts to your client, the [Consent Order] is thus spent.*
>
> 3.3 **The 'cash sales invoices' and 'bank statements' requested by your client go well beyond the terms of the [Consent Order] and are not 'accounts'.**
>
> 4. *Our client therefore contends that there is no obligation on part of the 1st Defendant to provide your client with these documents, and neither is your client entitled to them.*
>
> (emphasis added)

[11] In response to KC's letter dated 13 June 2014, Messrs DNW replied by way of a letter dated 18 June 2014 ('DNW's letter dated 18 June 2014') stating, among others:

> *Further please be informed that we have been instructed by our client to refute paragraph 3.2 of [KC's Letter dated 13.6.2014] and our client further contends that the report prepared by the previous auditor was incomplete and this was clearly stated in their report at page 14 under item no. 6. We enclosed herewith the relevant page of the report for your attention.*
>
> *As for paragraph 3.3 of [KC's Letter dated 13.6.2014], our client contends that the word "account" does include the "cash sales invoices" and the "bank statement" being part of the accounting records of the [1st Defendant].*
>
> **Therefore, our client's request for the inspection of the documents is in accordance with the [Consent Order].**
>
> **Since your clients refused to comply with the [Consent Order], our client shall take the appropriate action. (emphasis added).**

[12] Messrs AYA sent a letter dated 16 July 2014 to Messrs DNW ('AYA's letter dated 16 July 2014') stating as follows:

> Please note we are in the process of compiling the above documents. *The following documents are required by us to complete the Investigative Audit. Thus it would be appreciated if you kindly forward these documents (Outstanding Documents) to us at your earliest convenience.*
>
> 1. **All Cash Sales Invoices** to Yinghua and unknown parties from 2011 to 2012
> 2. **All Credit Notes (goods sold to Toyota ASSB which returned inwards)** from 2004 to 2012
> 3. **Buyer's Order/Purchase Order from ASSB** from 2004 to 2012
> 4. **Mao Sheng's Buyer's Order/Purchase Order to suppliers/ exporters/manufacturers** from 2004 to 2012
> 5. **Bill of Lading/Packing List/Invoices from Thailand supplier via Toyota-Tsuso Invoices** 2004 to 2012
> 6. **Employee Register** from 2004 to 2012
> 7. **Minutes of Board Meetings** from 2004 to 2012
> 8. **Bank Statements** from January 2008 to December 2012.
>
> (emphasis added)

Application For Leave To File Committal Application

[13] Order 52 r. 3(1) and (2) RC provide as follows:

> *3(1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.*

(2) An application for such leave must be made ex parte to the Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

(emphasis added).

[14] On 6 August 2014, the applicant filed an *ex parte* notice of application in court enclosure no. 26 under O. 52 r. 3(1) and (2) RC for leave to apply for a committal order against the third to fifth defendants ('leave application').

Statement Under O. 52 r. 3(2) RC

[15] The leave application is supported by a statement ('statement') required by O. 52 r. 3(2) RC which, among others, set out the grounds on which the committal of the third to fifth defendants are sought.

[16] The statement states, among others (with all its grammatical and typographical errors):

Non Compliance [sic] of the [Consent Order]

…

9. *[CH's Report] is incomplete as the investigation and/or inspection by CH [Investigative Audit] was and is hindered by the Defendants (sic) refusal to cooperate with CH.*

10. *By the reason above, the 3rd to 4th Defendant (sic) have acted by themselves and on behalf of the 1st and 2nd Defendant (sic) together with the Company Secretary and/or all his agents or servants has (sic) breached the terms of the [Consent Order] and the said order (sic) by reasons hereinafter appearing.*

11. *Further, in the midst of investigation and/or inspection by CH, a request was sent to 3rd Defendant to arrange for an interview to enquire regarding the related party transaction undertake (sic) by the 1st Defendant.*

12. *However such request was turned down and had further prohibited any interview to be carried out with any of the directors of 1st Defendant as well as its employee. Such prohibition obstructs any investigation and/or inspection carried out by CH.*

13. *Besides being prevented from interviewing the directors and its employee, CH was and is also prevented from obtaining and inspecting documents related to the accounts of the 1st Defendant.*

14. Documents referred above are as follows:

(i) Cash sales invoices for 2011 and 2012;

(ii) Bank statements for:

– 2004: March, April, August and September

A – 2005: January and February

– 2006: May to July and December

– 2007: January, May, August to October, December

– 2008: January to December

B – 2009: January to May

15. CH has in their report stated that due to lack of the above mentioned documents and information, they have not completed their investigation and/or inspection into the accounts of the 1st Defendant.

C

16. *Therefore the action by the Defendant has prevented and obstructed CH from carrying out their work independent [sic] and completely thus the Defendants are in contempt of the [Consent Order]. As a result, the [Applicant] is unable to exercise his rights of inspection granted by the [Consent Order].*

17. Due to the incompleteness of [CH's Report], the [Applicant] has since appointed the new solicitors, [Messrs DNW] to take over conduct of this matter from his former solicitors.

D

18. Further the [Applicant] has also appointed a new chartered accountant namely [Messrs AYA] to finish up the outstanding matters in [CH's Report].

E

19. On 4.6.2014, the [Applicant's] solicitors has *(sic)* written a letter to the Defendants' solicitor, [Messrs KC] to request for documents in which [Messrs CH] could not obtained *(sic)* in their investigation and/or inspection.

20. However, on 13.6.2014, the Defendants have instructed their solicitors to reply to the [Applicant's] solicitors earlier where they objected to the Plaintiff's request for the [Outstanding Documents].

F

21. In this connection, the [Applicant] further instructed his solicitors to send a reply to them on 18.6.2014 to refute their averments in their letter dated 13.6.2014.

G

22. *The Defendants' refusal to comply with the [Consent Order] is in contempt of the same. Further, their averments in their letter dated 13.6.2014 are baseless and flaw [sic] as the [Applicant] has never agreed nor consented to an Order that only does inspection and that the word "account" in the [Consent Order] does include the "cash invoices and bank statements" as being part of the accounting records of the 1st Defendant.*

H

23. Moreover the new chartered accountant on 16.7.2014 written to the [Applicant's] new solicitors to request for the following [Outstanding Documents] in order to complete the investigation and/or inspection:- …

I

24. *The Outstanding Documents are the documents in which [Messrs CH] was prevented from obtaining and to inspect by the Defendants. As such in order for the new chartered accountant to complete the report, the Outstanding Documents are essential and necessary for them (sic).*

25. *In the premises, the [Applicant] humbly contends that the conduct of the Defendants does (sic) not tantamount to an abuse of the process of the Court but more seriously, the Defendants have clearly been in contempt of this Honourable Court.*

26. *In the circumstances, the Defendants have clearly disobeyed the [Consent Order] and acted in a manner calculated to subvert the course of justice ant that contempt has been committed against this Honourable Court and the [Applicant] therefore pray [sic] for an order in terms of this application.*

(emphasis added)

I have set out the statement *in extenso* because under O. 52 r. 3(2) RC, the statement constitutes the "charge" against an alleged contemnor. The following two cases demonstrate the importance of the statement:

(a) in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 3 MLJ 458, at p. 863 (CLJ); at pp. 470-471 (MLJ), Arifin Zakaria CJ decided as follows in the Federal Court:

> *[37] We wish to state in clear term that the alleged act of contempt must be adequately described and particularised in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself. The same approach was taken by the Supreme Court in Arthur Lee Meng Kwang case (see also Syarikat M Mohamed v. Mahindapal Singh & Ors [1991] 2 MLJ 112).*
>
> (emphasis added); and

(b) in *Zainuddin Muhammad v. ATSCO Ltd & Anor* [2001] 4 CLJ 141, at p. 143, Gopal Sri Ram JCA (as His Lordship then was) held in Court of Appeal as follows:

> The gravamen of the charge against the appellant appears in the statutory statement lodged in support of the contempt application.

Whether Leave For Committal Proceedings Should Be Given?

[17] In this case, the leave application is supported by the applicant's affidavit which, among others, verified the contents of the statement ('verifying affidavit').

[18] Paragraphs 1 and 2 of O. 52 r. 3 RC do not state the test, grounds or consideration for the court to take into account in deciding whether to grant leave for an applicant to commence committal proceedings.

[19] It is to be noted that for disobedience of court orders, r. 81.4(1) of the English Civil Procedure Rules ('CPR') does not require permission (CPR uses the term "permission" and not "leave") of court to commence committal proceedings.

[20] In *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210; [1993] 2 MLJ 217, at p. 213 (CLJ); pp. 221-222 (MLJ), Abdul Hamid Omar LP delivered the Supreme Court's judgment as follows:

> In the appeals before us, *leave to issue committal proceedings has been granted. This means that the learned High Court judge has accepted that there was a prima facie case for contempt against the appellants. It may well be that on the hearing of the motion proper, the appellants will be acquitted of any charge of contempt.*
>
> (emphasis added).

[21] The Court of Appeal in *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors & Another Appeal* [2010] 2 CLJ 858; [2009] 3 MLJ 191, at p. 204, affirmed the High Court's decision to set aside *ex parte* leave to commence committal proceedings on the ground that there was no *prima facie* contempt of court by the second respondent. Unfortunately, there was no discussion in *Woodsville Sdn Bhd* on what constitutes a *prima facie* case for leave to be granted to institute committal proceedings.

[22] I am unable to find any Malaysian case which explains the meaning of *"prima facie"* case and the standard of proof required for leave to commence committal proceedings ('leave requirement').

[23] I am of the following view regarding the leave requirement:

(a) the purpose of the leave requirement is to ensure that there is no abuse of the committal procedure. The leave requirement acts as a sieve to ensure that there is a *prima facie* basis for the committal application;

(b) for criminal cases, the *prima facie* case requirement at the end of the prosecution case as laid down by ss. 173(f)(i), (ii), 180(1), (2) and (3) of the Criminal Procedure Code ('CPC') is only satisfied if there is proof beyond all reasonable doubt of the charge against the accused – please see, for example, the judgment of Gopal Sri Ram JCA (as His Lordship then was) in the Federal Court case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, at p. 467. I do not think that the high standard of proof beyond all reasonable doubt is appropriate for the leave requirement. My opinion is based on the following reasons:

(i) according to s. 3 CPC, the provisions of CPC, including ss. 173(f)(i), (ii), 180(1), (2) and (3) CPC, only apply to inquiries or trials of "offences". Section 2(1) CPC defines an "offence" as "any act or omission made punishable by any law for the time being in force". It is clear that committal proceedings under O. 52 RC and the leave requirement do not concern any criminal offence within the meaning of s. 2(1) CPC; and

(ii) the purpose of the leave requirement is to prevent abuses of the committal procedure. Such a purpose may be fulfilled without the need for such a high standard of proof beyond all reasonable doubt;

(c) a *prima facie* case of contempt of court is satisfied if:

(i) the statement and verifying affidavit show that the respondent in question has committed a specie of contempt of court, for example, the respondent has:

(1) breached an injunction or court order;

(2) breached an undertaking to court;

(3) scandalised the court;

(4) interfered with the due administration of justice or perverted the course of justice in relation to pending proceedings; and

(5) published or disseminated publication which interferes with the course of justice in pending proceedings, namely *sub judice* publication or *sub judice* dissemination of publication.

In *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401; [2002] 4 MLJ 241, at 248, Haidar FCJ (as His Lordship then was) held in the Federal Court that the categories of contempt of court are never closed; and

(ii) the contents of the verifying affidavit should not be inherently improbable; and

(d) the court should keep an open mind and not make any finding of fact as an application for leave to commence committal proceedings is made on an *ex parte* basis (without hearing the respondent) and the respondent may still raise a reasonable doubt at the end of the committal proceedings – *Wee Choo Keong*, at p. 222.

[24] I allowed the leave application on 20 August 2014 ('leave for committal') because:

(a) a *prima facie* breach of the consent order by the third to fifth defendants had been disclosed by the statement and the verifying affidavit; and

(b) the contents of the verifying affidavit were not inherently improbable.

Applicant's Committal Application

[25] Pursuant to the leave for committal, the applicant filed a notice of application in court encl. no. 31 ('court encl. no. 31') which applied for, among others, a committal order against the third to fifth defendants for breach and failure to comply with the consent order.

A **Application To Set Aside Leave For Committal**

[26] The third to fifth defendants filed an application in court enclosure no. 38 ('court encl. no. 38') to, among others, set aside the leave for committal.

B **Procedure For Committal Proceedings**

[27] Under O. 52 r. 6(4), the third to fifth defendants have a right to give oral evidence. This is clear from the following English cases:

(a) the judgments of Lord Denning MR and Megaw LJ in the Court of Appeal case of *Comet Products UK Ltd v. Hawkex Plastics Ltd* [1971] 2 QB 67, at p. 73 and 75; and

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(b) Nicholas Wall J's (as His Lordship then was) judgment in the High Court case of *Re B (A Minor) (Contempt of Court: Affidavit Evidence)* [1996] 1 WLR 627, at p. 629.

D **[28]** On the first day of hearing of court enc. no. 31, I asked the learned counsel for the third to fifth defendants on whether his clients would exercise their right under O. 52 r. 6(4) RC to give oral evidence to oppose court encl. No. 31. Learned counsel for the third to fifth defendants informed the court that the third to fifth defendants:

E

(a) did not wish to give oral evidence but they wished to file an application to set aside the leave for committal (which was subsequently filed as court encl. no. 38); and

(b) had decided to affirm an affidavit to oppose Court Enc. No. 31 and to support court encl. no. 38.

F

Court Has Power To Set Aside *Ex Parte* Leave To Commence Committal Proceedings

[29] It is clear that the court has the power to set aside *ex parte* leave which has been granted earlier for an applicant to commence contempt of court proceedings. In *Tan Sri Dato' (Dr) Rozali Ismail*, at p. 854 (CLJ); p. 463 (MLJ), the Federal Court held as follows:

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> 1. *On 19 May 2011, this court gave leave to the applicants to commence committal proceedings against the respondents. The leave was granted pursuant to O. 52 r. 2(2) of the Rules of the High Court 1980 ("the RHC") read together with r. 3 of the Rules of the Federal Court ("the RFC"). The committal proceeding was set down for hearing before us on 14 December 2011. However, the respondents had, in the mean time, applied for the leave order to be set aside. Since leave was granted by us on an ex parte basis, it is within the inherent power of this court to revoke the same if it is of the view that the original leave was granted under a misapprehension upon new matters being placed before it. (See Lord Denning MR in Becker v. Neol & Anor [1971] 1 WLR 803).*

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Having heard the parties, we allowed the respondents' applications and set aside our earlier order.

(emphasis added)

[30] It is to be noted that under O. 32 r. 6 RC, the court may set aside any *ex parte* order, including *ex parte* leave to commence committal proceedings.

[31] In *Taylor & Anor v. Ribby Hall Leisure Ltd & Anor* [1997] 4 All ER 760, at pp. 762, 767 and 769, Mummery LJ held in the English Court of Appeal that the court has the inherent discretionary power to strike out committal proceedings which constitutes an abuse of court process. According to Taylor, at p. 769:

In our judgment *it is, in general, preferable to make submissions on delay, prejudice, potential injustice and other factors relevant to the court's discretion in its contempt and supervisory powers at the substantive hearing rather than by a preliminary pre-emptive move to strike out. That procedure may be open to the objection that it increases the costs and delay that preliminary procedures are intended to avoid.*

(emphasis added)

Based on *Taylor*, there is no necessity to apply to strike out the leave for committal as the alleged contemnor may raise any objection at the hearing of the committal application which is filed pursuant to the leave for committal.

[32] In *Capital Insurance Bhd v. B S Sidhu* [1996] 3 CLJ 477; [1996] 3 MLJ 1, at p. 4, the Court of Appeal dismissed an application to set aside *ex parte* leave granted earlier by the Court of Appeal for the institution of committal proceedings, on the ground that the Court of Appeal "would not be able to entertain" such an application as leave was obtained *ex parte*. In view of *Tan Sri Dato' (Dr) Rozali Ismail,* O. 32 r. 6 RC and Taylor, it is clear that the court may set aside *ex parte* leave to file committal proceedings.

Court Encl. Nos. 31 And 38 Are Heard Together

[33] By consent of all parties, both court enc. no. 31 and court encl. no. 38 are heard together so as to save time, costs and effort.

Applicant's Submission

[34] In support of court encl. no. 31 and to oppose court encl no. 38, the applicant forwarded the following contentions:

(a) the third to fifth defendants have disobeyed the consent order by:

(i) not allowing the applicant's auditors to inspect the outstanding documents; and

(ii) hindering, preventing and obstructing the applicant's auditors from completing the investigative audit;

(b) the third to fifth defendants have:

(i) interfered with the due administration of justice; and

(ii) subverted the course of justice.

by wilfully:

(1) obstructing the investigative audit; and

(2) preventing the applicant's auditors from obtaining and inspecting the outstanding documents.

It is not necessary for the applicant to prove affirmatively that the third to fifth defendants have actually interfered with the due administration of justice. It suffices if the applicant can show that it is likely or there is a tendency on the part of the third to fifth defendants to have interfered with the due administration of justice; and

(c) there was no need to have personal service of the consent order on the third to fifth defendants because the consent order was filed in this court by the solicitors for the third to fifth defendants.

Contentions Of third To fifth Defendants

[35] The following arguments, among others, have been advanced by the third to fifth defendants to support court encl. no. 38 and to oppose court encl. no. 31:

(a) there was no personal service of the consent order on the third to fifth defendants;

(b) the consent order had no penal notice directed at the third to fifth defendants;

(c) there was no time period specified in the consent order for the third to fifth defendants to comply with para. (i);

(d) the committal application should have been made against the first defendant and not the third to fifth defendants;

(e) when the *ex parte* leave application was made, the applicant did not bring to the attention of this court the material parts of the judgment regarding the dismissal of applicant's winding up petition which showed that the first defendant "was acting within the scope of the (consent order)";

(f) the applicant's complaints have already been addressed by the dismissal of applicant's winding up petition. Accordingly, the applicant is barred by the doctrine of *res judicata* from proceeding with this committal proceedings; and

(g) the applicant can apply to this court to clarify the consent order. In other words, the applicant should not have instituted committal proceedings in view of the availability of a reasonable alternative.

Does *Res Judicata* Doctrine Apply To Bar Committal Proceedings?

[36] The third to fifth defendants cited the Supreme Court's judgment delivered by Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd lwn. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, at pp. 791-793 (CLJ); pp. 197-198, pp. 198-199 and pp. 199-200 (MLJ), as follows:

> *What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur. The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest rei publicae ut sit finis litium. It is only just that no one ought to be vexed twice for the same cause of action – nemo debet bis vexari proeadem causa. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.*
>
> Since a *res judicata* creates an estoppel per *rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel per *rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the *res judicata* is a rule of procedure and that an estoppel per *rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion. …
>
> Thus, *there are in fact two kinds of estoppel per rem judicatum. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.*
>
> *The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is res judicata.*
>
> *In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel per rem judicatum and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence. …*
>
> *On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither*

of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. …

(emphasis added)

According to learned counsel for the third to fifth defendants, the dismissal of applicant's winding up petition has decided that the first defendant has not breached the consent order. As such, the third to fifth defendants contended that the applicant is barred by the *res judicata* doctrine from pursuing committal proceedings against the third to fifth defendants based on the same alleged breach of the consent order by the first defendant.

[37] With respect, I am of the view that the applicant is not barred by the *res judicata* doctrine (both the cause of action estoppel doctrine and the issue estoppel doctrine), from commencing committal proceedings against the third to fifth defendants based on a breach of the consent order. My view is premised on the following reasons:

(a) the dismissal of applicant's winding up petition concerns the application of s. 218(1)(f) and (i) CA. The main purpose of committal proceedings is to prevent an undue interference with the administration of justice in the public interest. In *Tan Sri Dato' (Dr) Rozali Ismail*, at pp. 858-859 (CLJ); p. 467 (MLJ), the Federal Court explains the main object of contempt of court proceedings as follows:

> [20] In dealing with the applications to set aside the leave for committal proceedings, it is necessary for us to consider the law of contempt. *A good starting point would be the definition of contempt of court itself. Oswald's Contempt of Court (3rd Ed), at p 6 gives a general definition of contempt of court as follows:*
>
> > *To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants, or their witnesses during the litigation.*
>
> [21] *The jurisprudence for arming the court with the power to punish a contempt is best expounded by Brown J In re He Kingdon v .SC Goho* [1948] MLJ 17 as follows:
>
> > *But the root principle on which this inherent power to punish for contempt is founded, and the purpose for which it must be exercised, is not to vindicate the dignity of the individual judge or other judicial officer of a court or even of the court itself, but to prevent an undue interference with the administration of justice in the public interest.*
>
> (emphasis added).

As the purpose and the issues which arise in the applicant's winding up petition are different from the object and questions which need to be decided in committal proceedings, this court in deciding committal proceedings is not bound by any decision or finding in the applicant's winding up petition. In *Universal Trustee (Malaysia) Bhd v. Lambang Pertama Sdn Bhd & Anor* [2014] 1 LNS 227; [2014] 5 AMR 57, at pp. 70-72, I held that in deciding a subsequent application by the plaintiff to strike out the defendants' counterclaim, I was not bound by the issue estoppel doctrine (part of the *res judicata* doctrine), namely I was not bound by the findings made by my learned predecessor, Nallini Pathmanathan J (as Her Ladyship then was), in an earlier summary judgment application between the same parties; and

(b) if a court order is not clear, the ambiguous court order may still be construed by the court for the purpose of the civil dispute in question. However, in committal proceedings, if a court order is ambiguous, there can be no breach of a vague court order and hence, there can be no contempt of an ambiguous court order. Suffices for me to rely on the following cases:

(i) Gopal Sri Ram JCA's (as His Lordship then was) judgment in the Court of Appeal case of *Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals* [2002] 1 CLJ 695; [2002] 2 MLJ 107, at p. 109; and

(ii) the High Court's judgment by Azahar Mohamed J (as His Lordship then was) in *Yong Nyuk Fang & Anor v. Tan Boon Pin & Ors* [2006] 7 CLJ 296, at 308.

Based on the above cases, if I find the consent order to be vague, there can be no breach of an ambiguous consent order irrespective of the interpretation of the consent order given in the applicant's winding up petition.

Third To Fifth Defendants Did Not Breach Consent Order

[38] In construing the consent order, the following matters are relevant:

(a) the consent order is not an injunction or undertaking to this court. In fact, according to para. (vi), the *ad interim* injunction has already been discharged;

(b) all parties are legally represented in this suit and have been legally advised at all material times; and

(c) the terms of the consent order have been negotiated, drafted and agreed by all the parties in this case.

In view of the above facts, it is unlikely that there is any mistake in the consent order. If there is any ambiguity in the consent order, there can be no breach of a vague consent order according to *Mah Siew Keong* and *Yong Nyuk Fang.*

[39] It is clear that the consent order does not provide for:

(a) investigative audit; and

(b) the first defendant's directors and employees to be interviewed by any party, let alone the applicant's auditors ('proposed interview').

For the above reasons, I cannot accept paras. 9, 11 and 12 of the statement regarding the so-called obligation on the third to fifth defendants to assist in the investigative audit and the proposed interview.

[40] Paragraphs (i) and (iii) expressly mention "accounts" of the first defendant but the applicant has demanded to inspect and to make photocopies of the outstanding documents. The consent order did not define "accounts". As para. (i) has expressly referred to the undertaking set out is s. 167(6) CA, I will refer to the definitions of "accounting records" and "accounts" in s. 4(1) CA as follows:

> *"accounting records", in relation to a corporation, includes invoices, receipts, orders for payment of money, bills of exchange, cheques, promissory notes, vouchers and other documents of prime entry and also includes such working papers and other documents as are necessary to explain the methods and calculations by which accounts are made up;*
>
> *"accounts" means profit and loss accounts and balance sheets and includes notes or statements required by this Act (other than auditors' reports or directors' reports) and attached or intended to be read with profit and loss accounts or balance sheets.*
>
> (emphasis added)

[41] Paragraph (i) only states that the applicant and his auditors "are entitled to inspect the accounts" of the first defendant. The consent order does not mention anything about "accounting records" of the first defendant. Based on the above meanings of "accounting records" and "accounts" in s. 4(1) CA, I hold that the consent order does not provide that the applicant and his auditors "are entitled to inspect" the first defendant's "accounting records" and the outstanding documents. In fact, "Employee Register" and "minutes of board meetings" of the first defendant fall beyond the definition of the first defendant's "accounting records" and as such, the applicant's demands for such documents are clearly not warranted by the consent order.

[42] Even if I am wrong in construing the word "accounts" in the consent order, there is at the very least, an ambiguity in the meaning of the term "accounts". In *Mah Siew Keong*, at pp. 698-699 (CLJ); p. 109 (MLJ), the Court of Appeal held as follows:

> *If the respondent wanted the appellants' company to execute the deeds of assignment, then it should have taken greater care in settling the terms of injunction it sought and obtained from the High Court. In our view, if, as here, an ex parte injunction is drafted in wide and ambiguous terms, it is, difficult, if not impossible, to identify particular acts of contempt. Further, it is not appropriate in the present case to require*

appellants as directors or their company to seek clarification from the court as this would place an intolerable burden on the parties. It would mean that at every turn of an event, the director and the company would have to rush into court to find out if the acts they propose to do would offend the terms of the order. Put in that fashion, one can plainly see the ambiguity in the order.

So far as authority is concerned, we find it unnecessary to go beyond citing the passage in *Arlidge, Eady & Smith on Contempt* (2nd Ed) paras 12-43 at p 746. The relevant paragraph reads as follows:

> *An order or undertaking will not be enforced by committal if its terms are ambiguous, the rule being analogous to that which governs the interpretation of penal statutes. It is to the terms of the order itself that one must look in order to define the obligations imposed*. On the other hand, in cases where one is concerned with third parties who are seeking to subvert the purpose of a court order, the court is not confined to looking at the strict terms. Even a party might be held in contempt if such a purpose could be demonstrated, notwithstanding ambiguity in the wording.
>
> (emphasis added)

[43] Based on *Mah Siew Keong*, for the purpose of committal proceedings, a court order should be interpreted as if it were a penal legislation – if there is any ambiguity in the court order, the ambiguity should be resolved in favour of liberty of the alleged contemnor. Accordingly, if there is any ambiguity in the meaning of the word "accounts" in the consent order, such an ambiguity must be resolved in favour of the third to fifth defendants. The third to fifth defendants therefore did not breach the consent order when the first defendant did not allow the applicant to have access to the outstanding documents.

[44] There is a second reason why the third to fifth defendants did not disobey the consent order. As I have stated earlier, the consent order is not an injunctive order which compels the first defendant to allow the applicant to inspect and to make photocopies of the first defendant's "accounts". Paragraph (i) uses the phrase "entitled to inspect" and does not employ the mandatory term "must" or "shall". Furthermore, the consent order does not contain any penal notice in Form 83 of Appendix A to RC ('penal notice') directed at the first and third to fifth defendants (as required by O. 45 r. 7(4) RC). Form 83 reads as follows:

NOTICE ON CERTAIN
JUDGMENTS (O. 45 r. 7)

The endorsement should be in the following words or words to the following effect:

(a) In the case of a judgment or order requiring a person or body corporate to do an act within a specified time -

If you, the within-named ... (or ...) neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same.

A …

(c) In the case of a judgment or order requiring a body corporate to do or to abstain from doing the act, but it is sought to take enforcement proceedings against a director or other officer of that order.

B *If … neglect to obey this judgment (or order) by the time therein limited (or in the case of an order to abstain from doing an act, if … disobey this judgment (or order), you (a director or officer of the said …) will be liable to process of execution for the purpose of compelling the said to obey the same.*

(emphasis added)

C The omission of a penal notice in the consent order clearly shows that the consent order does not impose any mandatory obligation on the first defendant, let alone the third to fifth defendants. I will discuss later in this judgment the lack of a penal notice in the consent order.

[45] Order 45 r. 5(1) RC is relevant and is reproduced as follows:

D 5(1) **Where:**

(a) *a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5;* or

E (b) a person disobeys a judgment or order requiring him to abstain from doing an act,

then, subject to these Rules, the judgment or order may be enforced by one or more of the following means:

F (A) **with the leave of the Court, an order of committal**;

(B) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;

G (C) subject to the provision of the Debtors Act 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

(emphasis added).

As the consent order did not specify a time period for the first defendant to H give access of the outstanding documents to the applicant, O. 45 r. 5(1)(a) RC does not apply to the consent order. This judgment will discuss subsequently the lack of a time period in the consent order for the first defendant to comply with para. (i).

[46] The third reason for deciding that there is no disobedience of the I consent order by the third to fifth defendants is that I accept the contention of the learned counsel by the third to fifth defendants as stated in KC's letter dated 13 June 2014 that once the first defendant's accounts have been made

available to Messrs CH so as to enable the CH's report to be made, the first defendant has already complied with the consent order. Hence, there can be no breach of the consent order by the first and third to fifth defendants.

[47] It is trite law that:

(a) the applicant has the legal burden to prove beyond all reasonable doubt that the third to fifth defendants have breached the consent order – see, for example, Wan Adnan FCJ's (as His Lordship then was) judgment in the majority decision of the Federal Court in *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1995] 3 MLJ 549, at p. 574;

(b) if there is a doubt, the doubt ought to be resolved in favour of the third to fifth defendants – per Wan Adnan FCJ (as His Lordship then was) in *Wee Choo Keong*, at p. 574; and

(c) if two or more inferences may be drawn from the evidence, the inference most favourable to the alleged contemnor should be adopted.

Applying the above time-honoured principles, I find as a fact that when the first defendant has made available its accounts to Messrs CH and the CH report has been prepared, there exists a reasonable doubt on whether the first defendant and the third to fifth defendants have wilfully breached the consent order or not. Such a reasonable doubt in itself justifies a dismissal of court encl. no. 31.

Third To Fifth Defendants Did Not Interfere With Due Administration Of Justice

[48] The following two Federal Court cases have held that to constitute a contempt of court, there must be an act or omission which tends to:

(a) interfere with the due administration of justice; or

(b) pervert the course of justice

– in a proceeding

(i) *Tan Sri Dato' (Dr) Rozali Ismail*, at p. 467 (MLJ); and

(ii) *Monatech (M) Sdn Bhd*, at pp. 245, 248 and 253 (MLJ).

[49] In *Solicitor-General v. Radio Avon Ltd* [1978] 1 NZLR 225, at p. 234, the New Zealand Court of Appeal in a judgment given by Richmond P, decided as follows regarding a radio publication which scandalised a judge of the New Zealand Supreme Court (court of first instance in New Zealand at that time):

> *…, we accept Mr Palmer's (appellants' counsel) submission that in the present case the appellants ought not to have been convicted of contempt unless the facts established beyond reasonable doubt that there was a real risk, as opposed to a remote possibility, that the broadcast item would undermine public confidence in the administration of justice.*
>
> (emphasis added)

Radio Avon Ltd does not concern breach of a court order but I am of the view that for a breach of a court order or undertaking to court to constitute a contempt of court, there should be a real risk that such a breach will undermine public confidence in the administration of justice. In cases of a breach of an injunction or an undertaking to court, there is definitely a real risk, if not a fact, that public confidence in the administration of justice will be undermined.

[50] I am of the considered view that as this suit has ended with the recording of the consent order, there can be no tendency by the third to fifth defendants to interfere with proceedings in this suit as explained in *Tan Sri Dato' (Dr) Rozali Ismail* and *Monatech (M) Sdn Bhd*. There is also no real risk that a breach of the consent order (if any) will undermine public confidence in the administration of justice as stated in *Radio Avon Ltd*. On these grounds, this court dismisses court encl. no. 31.

Is There A Need To Maintain Or Vindicate Authority Of Court In This Case?

[51] The power to punish for contempt of court is to maintain or to restore the authority of the court, especially when there is a breach of an injunction or undertaking to court. In *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors* [1986] 2 CLJ 109; [1986] CLJ (Rep) 58; [1986] 2 MLJ 193, at pp. 61-62 (CLJ); pp. 195-196 (MLJ), the Supreme Court in a judgment given by Mohamed Azmi SCJ, decided as follows:

> *Firstly, on locus standi, we think the following passage in the judgment of Mehar Singh CJ in Sher Singh v. RP Kapur AIR 1968 Punj 217 223 is pertinent:*
>
> > *A contempt of Court is basically an offence against the Court and not against the Judge personally and it is punishable because of the necessity of maintaining the dignity of and respect towards the Court. The power to punish for a contempt is exercised to vindicate the Court's dignity. …*
>
> *In this country, the need to protect the dignity and integrity of the Supreme Court and the High Courts is recognised by Article 126 of the Federal Constitution, and similar provision is repeated in section 13 of the Courts of Judicature Act 1964.*
>
> (emphasis added)

[52] Based on *Arthur Lee Meng Kwang*, even if there has been a breach of the consent order, I do not see a need to maintain or vindicate the authority of this court by citing the third to fifth defendants for contempt of court. Hence, I will dismiss court encl. no. 31 on the ground that the court's authority and dignity has not been compromised by the first defendant's refusal to allow the applicant to have access and to make photocopies of the outstanding documents.

Applicant Did Not Act With Reasonable Promptitude

[53] As a contumelious act lowers the court's authority and dignity, an applicant for a committal order, must act with reasonable promptitude. This is clear from the following cases:

(a) in *Malaysian Bar v. Tan Sri Dato Abdul Hamid bin Omar* [1989] 2 CLJ 373; [1989] 1 CLJ (Rep) 92; [1989] 2 MLJ 281, at pp. 93 and 95 (CLJ); pp. 281 and 283 (MLJ), Hashim Yeop Sani CJ (Malaya) held in the Supreme Court as follows:

> *In this proceeding the applicant, the Malaysian Bar, is seeking leave to apply for an order for the committal to prison of Tan Sri Dato Abdul Hamid bin Omar, the respondent, for alleged contempt of court committed on 2 July 1988 where it is alleged that the respondent attempted to prevent, frustrate and interfere with the sitting of the Supreme Court of Malaysia.*
>
> …
>
> *Finally there has certainly been an inordinate delay in making the application. The resolution of the Malaysian Bar to institute proceedings for contempt was passed on 19 July 1988. The application for leave was filed on 24 April 1989. There was no explanation for the delay in the affidavit of the secretary of the Bar. The allegation of contempt is a serious matter and should be pursued within a reasonable time. The delay must be explained. In our view a lapse of nearly nine months unexplained in the affidavit is not reasonable. Motion dismissed.*
>
> (emphasis added); and

(b) the English Court of Appeal's judgment in *Taylor*, at p. 769, as follows:

> *We add for future guidance that proceedings of this kind should, in the absence of a good reason, be initiated within a reasonable time of a party obtaining knowledge of a breach of a court order or undertaking or other misconduct.* In most cases the court is dependent on a party bringing a breach or a case of misconduct to its notice so that appropriate action can be taken.
>
> (emphasis added).

[54] CH's report has already been prepared on 9 July 2013. By this date, the applicant would have actual knowledge regarding the alleged refusal of the first defendant to allow the applicant's auditors to have access and to make photocopies of the outstanding documents. The leave application is only filed on 6 August 2014. There has been an unexplained delay of nearly 13 months. It is to be emphasised that the applicant was legally represented at all times, first by Messrs PD and subsequently by Messrs DNW.

[55] Based on *Malaysian Bar*'s case, I allow court encl. no. 38 and set aside the leave for committal on the ground that the applicant has not acted with reasonable promptitude in this case.

A **Did Applicant Comply With Procedural Safeguards Intended To Protect Third To Fifth Defendants?**

No Personal Service Of Consent Order On Third To Fifth Defendants

[56] Order 45 r. 7(2), (3), (6) and (7) RC provide as follows:

B 7.(2) *Subject to* Order 26, rule 7(3), and **paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless:**

(a) a copy of the order had been served personally on the person required to do or abstain from doing the act in question; and

C (b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

7.(3) *Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule* D *5(1)(B) or (C) unless:*

(a) a copy of the order has also been served personally on the officer against whom an order of committal is sought; and

(b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration E of the time within which the body was required to do the act.

…

(6) *An order requiring a person to abstain from doing an act may be enforced* F *under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either:*

(a) **by being present when the order was made;** or

G (b) **by being notified of the terms of the order, whether by telephone, telegram or otherwise.**

7.(7) *Without prejudice to its power under Order 62, rule 5, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.*

H (emphasis added).

[57] It is not disputed that the consent order has not been personally served on the third to fifth defendants. The applicant's learned counsel has submitted that the consent order need not be served personally on the third to fifth defendants as the consent order has been filed in this court by the I solicitors of the third to fifth defendants. With respect, I am not able to accede to this contention for the following reasons:

(a) Order 45 r. 7(6)(a) and (b) RC do not apply in this case as there is no evidence that the third to fifth defendants: A

(i) are present when the consent order is made; and

(ii) have been notified of the terms of the consent order by telephone, telegram or otherwise; B

(b) Order 45 r. 7(2)(a) RC requires personal service of the consent order on the third to fifth defendants. In respect of the interpretation of O. 45 r. 7(2)(a) RC, there is a Court of Appeal's judgment given by Abu Mansor JCA (as His Lordship then was) in *Capital Insurance Bhd v. BS Sidhu* [1996] 3 CLJ 477; [1996] 3 MLJ 1, pp. 480-482 (CLJ); pp. 4 and 5-6, as follows: C

> Encik Manjit Singh contended that following that order dated 25 July 1995, he applied for the return of the sum ordered amounting to RM730,859.71, the sum which was deposited by the applicant's counsel into the account of the respondent. Counsel for D
> the applicant said that he eventually had to write two letters, one on 25 July 1995, and the other on 31 July 1995, calling for the return of that sum. He submitted that the respondent herein wilfully refused or neglected to refund the sum ordered. *The counsel for the applicant conceded that the order of the Court of Appeal on 25 July 1995 was not served on the respondent, but he contended that it was not* E
> *necessary for the applicant's counsel to have done that because Encik Sidhu himself was present in court representing the respondent in that appeal, and was well aware of what this court's order was. He is an officer of the court and it was his duty to have obeyed the court's clear order.* He prayed for the order asked for. …
>
> *It was common ground that the said order was not served during the period the respondent was alleged to have disobeyed. Encik Yusuf Khan contended that it was not that the respondent had disobeyed the order but the truth was that the order was not served on him. Was it necessary to have the order served in spite of the fact that the respondent was present in court and heard the court pronounce the order? The respondent's counsel referred us to O. 45 rr. 5(1) and 7 of the RHC: …* F G
>
> *We were unanimous in our view that although the respondent was present and heard the order directing him to refund the money deposited, nonetheless, the respondent is required by the RHC to be served with the order personally before he could be said to have wilfully disobeyed the order. …* H
>
> *As we have stated, we were unanimous in that we find merit in the argument of counsel for the respondent that before contempt proceedings, which affect the liberty of a subject, can be enforced, there must be strict compliance with the rules that require the order of the court be served on the respondent. And we make no distinction that he was then counsel and present hearing the order. If he had been served with a sealed copy of the order according to the rules and had disobeyed, then we can say in law that it is contempt.* Since I

A he had duly paid after service of the order, we say he had not committed any contempt. We hereby dismiss the motion with costs.

(emphasis added).

B The Court of Appeal's judgment in *Capital Insurance Bhd* is binding on me as a matter of *stare decisis*; and

(c) the applicant has not applied under O. 45 r. 7(7) RC for me to dispense with the personal service of the consent order on the third to fifth defendants. In any event, I am not minded to exercise my discretionary C power under O. 45 r. 7(7) RC as committal proceedings concern the liberty of the third to fifth defendants.

Based on the applicant's non-compliance with O. 45 r. 7(2)(a) RC, I allow court encl. no. 38 to set aside the leave for committal.

Omission Of Time Period In Consent Order

D

[58] Learned counsel for the third to fifth defendants has contended that the consent order does not specify a time period to comply with para. (i).

[59] Order 42 r. 6(1) as well as O. 45 r. 6(1), (2) and (3) RC are relevant and are reproduced as follows:

E

Order 42

6.(1) *Subject to paragraph (2), a judgment or order which requires a person to do an act shall specify the time after service of the judgment or order, or some other time, within which the act is to be done.*

F 6.(2) Where the act which any person is required by any judgment or order to do is to pay money to some other person, give possession of any immovable property or deliver any movable property, a time within which the act is to be done need not be specified in the judgment or order in accordance with paragraph (1), but the foregoing provision shall not affect the G power of the Court to specify such a time and to adjudge or order accordingly.

Order 45

6.(1) Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be H done, the Court shall, without prejudice to Order 3, rule 5, have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time as may be specified therein.

6.(2) *Where, notwithstanding Order 42, rule 6(1), or by reason of Order 42,* I *rule 6(2), a judgment or order requiring a person to do an act does not specify a time within which the act is to be done the Court shall*

have power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein.

6.(3) *An application for an order under this rule shall be made by notice of application and such notice of application shall, notwithstanding anything in Order 62, rule 10, be served on the person required to do the act in question.*

(emphasis added)

[60] I am of the following considered view:

(a) Order 45 r. 6(1) RC does not apply as the consent order does not specify a time period for first defendant "to do an act";

(b) under O. 45 r. 6(2) and (3), the applicant may apply to this court to specify a time period in the consent order for the first defendant to "to do an act" ('application to specify time period'). In this case, the applicant has not made an application to specify time period; and

(c) the Court of Appeal's judgment delivered by Augustine Paul JCA (as His Lordship then was) in *Loh Eng Leong & Anor v. Lo Mun Sen & Sons Sdn Bhd & Anor* [2003] 4 CLJ 743; [2003] 4 MLJ 284, is relevant to this case. *Loh Eng Leong*, at pp. 745-747 and 750-751 (CLJ); pp. 286-287, 288 and 290-291 (MLJ), decided as follows:

> On 26 July 2001, *the appellants obtained an order of court against the respondents for a direction that the Register of Members of Lo Mu Sen & Sons Sdn Berhad ('the Register of Members') be rectified pursuant to s. 162 of the Companies Act 1965 by striking out the name of Loh Eng Wah therefrom as the holder of 161 shares of the said company numbered under share certificates 0050 to 0053 both inclusive. It must be observed that it did not specify the time within which the Register of Members must be rectified.* The order of court was duly extracted and served on the respondents' solicitors on 15 October 2001. The respondents did not inform the appellants whether they have rectified the Register of Members as ordered. *The appellants then realised that the order of court had been breached as the shares in question had been transferred to the second respondent on or about September 2002. This prompted the appellants to consider filing an application for leave to commence committal proceedings against the persons responsible for breaching the order of court. However, they realised that they were hampered by the absence of a penal notice in the order of court. Accordingly, they wrote to the deputy registrar of the court asking for the penal notice to be indorsed in the order of court. They were advised to apply formally to the court to have the indorsement. An ex parte notice of motion was then filed by the appellants asking for leave to indorse the penal notice in the order of court.*
>
> *When the application came up for hearing before us on 7 August 2003, learned counsel for the appellants said that the deputy registrar ought to have indorsed the penal notice in the order of court.* At this stage, learned

counsel for the respondents, who was present, applied for an adjournment on the ground that the application ought to have been *inter partes* and that they should be heard before any order is made. Learned counsel for the appellants said that the application should properly be *ex parte* and that the order prayed for should be granted. *With regard to the first observation made by learned counsel for the appellants, we were of the considered view that the deputy registrar acted properly in advising the appellants to obtain an order of court to enable him to indorse it with the penal notice as the draft stage of the order had passed. We agreed with learned counsel for the respondents that the application ought to have been inter partes. This is because the application is not one that involves the correction of a mere clerical mistake and the respondents must therefore be heard. …*

The requirements of [Order 42 rule 6(1)] must be strictly complied with before a judgment or order can be entered on the ground of the failure of a party to do an act within a specified time. In other words, the judgment or order which requires a person to do an act must itself specify the time after its service or some other time within which the act is to be done. Therefore, an order in the form that 'unless' a party should do an act within a specified time without specifying the time after service or some other time within which the act is to be done is bad and judgment entered pursuant thereto is liable to be set aside (see *Van Houten v. Foodsafe Ltd* [1980] 124 SJ 277). …

It is therefore clear that where an order of court to do an act must specify the time within which an act is to be done then such time must be specified. It is only in such cases that there can be indorsement with the penal notice. As the indorsement with the penal notice is a prerequisite to the making of a committal order which involves the liberty of the subject it is particularly important that the relevant rules are duly complied with (see Nicholls v. Nicholls [1977] 147 NLJ 61; Allport Alfred James v. Wong Soon Lan [1989] 1 MLJ 338). It follows that where no time period has been specified in cases where it should have been done a penal notice cannot be indorsed on it. Such an order is irregular and unenforceable (see Grenek Sdn Bhd v. Lew Wa Chow [1991] 1 MLJ 125; Patricia Liew Yam Ngoon v. MME Fashion Sdn Bhd [1996] 5 MLJ 127). The party against whom the order is made is entitled as of right to have it set aside (see *Hitachi Sales (UK) Ltd v. Mitsui OSK Lines Ltd [1986] 2 Lloyds Rep 574). However, the absence of a time period to do an act which falls under r. 6(1) is not necessarily fatal. It can be cured by a supplemental order (see Grenek Sdn Bhd v. Lew Wa Chow).* In this regard, The Supreme Court Practice 1985 says at p 632:

> When the order omits to fix a time, it is not thereby rendered ineffectual, but the court will make a supplemental order fixing the time, in the ChD designated a 'four-day order,' although the time after service of the order is not always four days (*Needham v. Needham* [1842] 1 Hare 633). But, except in the case of a judgment or order for the payment of money to some other person, or for giving

> possession of land or for delivery of goods, until a time is fixed the order cannot be enforced (*Gilbert v. Endean* [1878] 9 Ch D 259, p 266, CA; *Re Wilde* [1910] WN 128, CA; *Townend v. Townend* [1906] 93 LT 680, CA (a divorce case).
>
> *In this case, the order of court dated 26 July 2002 which requires the Register of Members to be rectified is not one that falls within O. 42 r. 6(2). As it is one that must be done within a prescribed period the time period must have been specified in it before it can be enforced. There is no compliance with this requirement as the time period within which the act must be done has not been specified. Neither was there a supplemental order to fix a time period. The corollary is that the appellants are not entitled to have the penal notice indorsed in the order.* The application before us is therefore without merit. Accordingly, we dismissed it without the need to consider an adjournment as requested by the respondents.
>
> (emphasis added).

Premised on *Loh Eng Leong*, if there is no application to specify time period, the applicant cannot apply to endorse the penal notice on the consent order as against the third to fifth defendants.

If the applicant has successfully applied to this court to specify a time period in the consent order and to endorse the penal notice on the consent order as against the third to fifth defendants (endorsed and amended consent order), the endorsed and amended consent order has to be personally served on the third to fifth defendants before the applicant can enforce the endorsed and amended consent order against the third to fifth defendants. It is therefore clear that the applicant cannot rely on the consent order to cite the third to fifth defendants for contempt of court.

Effect Of Lack Of Penal Notice In Consent Order

[61] Penal notice is provided by O. 45 r. 7(4) RC which reads as follows:

> 7.(4) **There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served:**
>
> (a) *in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein,* or, if the order is to abstain from doing an act, that if he disobeys the order, *he is liable to process of execution to compel him to obey it*; and
>
> (b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, the body corporate is liable to process of execution to compel the body to obey it.
>
> (emphasis added)

[62] In *Loh Eng Leong*, at p. 746 (CLJ); p. 287 (MLJ), the Court of Appeal explained the importance of a penal notice as follows:

> *It is true, as contended by learned counsel for the appellants, that a failure to indorse the order of court with a penal notice is fatal to an application for committal* (see *Leow Seng Huat v. Low Mui Yein* [1996] 5 MLJ 381; *General (Rtd) Tan Sri Hashim Mohd Ali & Anor v. Francis a/l MG Mirandah* [2000] MLJU 436; *Gribbles Pathology (M) Sdn Bhd v. Adventist Hospital & Clinic Services (M) Bhd* [2002] MLJU 619; [2003] 1 CLJ 321). *The Rules of the High Court 1980 ('the RHC') provide for the instances where an order of court can be indorsed with a penal notice pursuant to which an order of committal can be made.*
>
> (emphasis added)

[63] The following appellate cases has clearly decided that the lack of a penal notice in a judgment or order is fatal to a committal application based on the enforcement of that judgment or order:

(a) the Court of Appeal case of *Inter Heritage (M) Sdn Bhd v. ASA Sport Sdn Bhd* [2009] 2 CLJ 221, at pp. 230-231;

(b) the Singapore Court of Appeal's judgment in *OKRST Arumugam v. KRSSP Suppiah Chettiar* [1935] 1 LNS 43; [1935] MLJ 4, at pp. 6, 7 and 9-10 (MLJ); and

(c) the Singapore Court of Appeal case of *The "Vanda"* [1960] 1 LNS 145; [1960] 1 MLJ 283, at p. 285 (MLJ).

[64] In view of the omission of the penal notice in the consent order, the leave for committal should be set aside.

Whether Applicant's Non-compliance With Procedural Safeguards Are Curable?

[65] As elaborated above, the applicant has breached the following procedural safeguards meant to protect the third to fifth defendants ('applicant's non-compliance') when the applicant filed committal proceedings in this case against the third to fifth defendants:

(a) there was no personal service of the consent order on the third to fifth defendants;

(b) no time period was specified in the consent order; and

(c) the consent order lacked a penal notice directed at the third to fifth defendants.

[66] The question that now arises is whether the applicant's non-compliance can be cured under O. 1A, O. 2 r. 1(1), (2) and (3) RC. Our apex court in the following cases have held that the court may cure mere technical irregularities in committal proceedings:

(a) in *Arthur Lee Meng Kwang*, at p. 61 (CLJ); p. 195 (MLJ), the Supreme Court decided as follows:

> *There is therefore a distinction in principle between cases where there have been non-observance of some safeguards laid down in Order 52 RHC in the interest of the alleged contemnor, and a mere technical irregularity. Whilst the former is fatal, the latter is not. In our opinion, this is the correct principle to be applied in all contempt proceedings under Order 52 RHC, which, it must be noted, is distinct from summary contempt procedure which is normally resorted to only in urgent and imperative cases, where the contempt is committed in the face of the Court.* (See *Cheah Cheng Hoc v. Public Prosecutor* [1986] 1 MLJ 299).

(emphasis added); and

(b) the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail*, at p. 472, affirmed *Arthur Lee Meng Kwang* as follows:

> *In this regard, we fully agree with the view expressed in Arthur Lee Meng Kwang. …*
>
> *Similarly, in the present case, we are of the view that the irregularities complained of are mere technical irregularities which do not cause any prejudice or injustice to the respondents. We accordingly dismissed the procedural objection raised by the respondents.*
>
> (emphasis added).

[67] I am not able to exercise my discretionary power under O. 1A, O. 2 r. 1(1), (2) and (3) RC to cure the applicant's non-compliance. This is due to the following reasons:

(a) there is no proof beyond all reasonable doubt that the third to fifth defendants have breached the consent order;

(b) there is no tendency by the third to fifth defendants to interfere with the due administration of justice in this suit as this suit has already been concluded with the recording of the consent order; and

(c) there is no necessity to maintain or vindicate the court's authority in this case.

If this court exercises its discretionary power under O. 1A, O. 2 r. 1(1), (2) and (3) RC to cure the applicant's non-compliance, this will cause an injustice to the third to fifth defendants because for reasons stated in this judgment, there is no lawful basis for the committal proceedings against the third to fifth defendants.

Whether Committal Proceedings Is A Last Resort Or Does Applicant Have An Alternative Avenue?

[68] In *McLeod v. St Aubyn* [1899] AC 549, at 561, an appeal from St Vincent and the Grenadines, Lord Morris delivered the opinion of the Privy Council as follows:

A *The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice.*

B (emphasis added)

[69] The power to punish for contempt of court should be used sparingly and as a last resort in the interest of administration of justice where all other reasonable avenues have failed.

C **[70]** Learned counsel for the third to fifth defendants has submitted that the applicant may seek clarification of the scope of the consent order from this court. With respect, I am not amenable to this view. This is because for reasons expressed above, the terms of the consent order do not impose any mandatory obligation on the first defendant, let alone the third to fifth defendants.

D **[71]** The applicant's true complaint is that the investigative audit cannot be completed due to the applicant's lack of access to the outstanding documents. The purpose of the investigative audit is to ascertain whether, among others, the third to fifth defendants have breached their statutory duties owed to the first defendant under s. 132(1), (1A), (1B) and (2) CA ('alleged breaches'). I
E am of the considered view that the applicant has a right to lodge a complaint with "Suruhanjaya Syarikat Malaysia" ('SSM') and SSM has the following investigative powers under CA to investigate the alleged breaches:

(a) power to investigate the first and third to fifth defendants under s. 7C(1)
F CA;

(b) power to inspect the first defendant's documents under s. 7B(1) and (2) CA;

(c) power to enter the first defendant's premises to search and seize any document under s. 7C(3) CA; and
G

(d) power to examine any person, including the third to fifth defendants, under s. 7D(1), (2) and (3) CA.

[72] As the applicant has a reasonable alternative of complaining to SSM in respect of the investigative audit, the applicant should not have resorted
H to committal proceedings in this case.

Court's Decision

[73] In summary:

(a) court encl. no. 38 is allowed with costs to be paid by the applicant to
I the third to fifth defendants; and

(b) court encl. no. 31 is dismissed with costs to be paid by the applicant to the third to fifth defendants.

[74] It is hoped that contempt of court should only be used as a last resort when there is a tendency to interfere with the due administration of justice and there is a real need to maintain or vindicate the authority of the court.